In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1121

CARL RAY HOOD A/K/A ROY ELTON HAWKINS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that a trial witness concealed promises of leniency given him by the government; petitioners Ward and Base also contend that there was insufficient evidence to sustain their conspiracy convictions.

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioners were convicted of conspiracy to use the mails and interstate telephone lines in a scheme to defraud and of conspiracy to transport in interstate commerce goods obtained by fraud, in violation of 18 U.S.C. 371, 1341, 1343, and 2314. Petitioner Hawkins[1] was sentenced to five years' imprisonment and fined $10,000; petitioner Ward was sentenced to three years' imprisonment and fined $5,000; petitioner Base was sentenced to two years' imprisonment and fined $2,500. The court of appeals affirmed (Pet. App. A).

[1]At the time of the conspiracy, petitioner Hawkins used the alias Carl Hood, which he had adopted several years before (Tr. 358).

The evidence showed that in February 1972 petitioner Hawkins met with Troy Sumrall and John Cash and discussed the formation of F & W Industrial Supply. The group discussed obtaining a credit rating for F & W by using the established credit of John Cash, purchasing as much merchandise as possible, reselling it, and keeping the proceeds without paying their suppliers (Tr. 17-19). The firm was to operate for about ninety days, at which time bankruptcy would be declared (Tr. 86-90).

On March 1, 1972, F & W was formed as a partnership, with Sumrall as general partner and Cash as a limited partner (Tr. 22-23, 35). Petitioner Hawkins and Cash decided that Sumrall should use an alias. Subsequently, Sumrall adopted the name Charles Duke (Tr. 20-22). Sumrall described his role at F & W as "just somebody to be there"; petitioner Hawkins was to conduct the business (Tr. 19, 89). A credit rating was obtained from Dun & Bradstreet, a checking account was opened in the name of F & W Industrial Supply, and an office was obtained (Tr. 19, 22, 24-25).

About a week later, petitioner James Calvin Ward was hired to purchase and sell merchandise on behalf of F & W (Tr. 346-349). In late March 1972, petitioner Ward purchased over $8,900 worth of stereo equipment from Morris Electro Products. The equipment was never paid for (Tr. 126-127). In April 1972, petitioner Ward purchased $8,000 worth of cooling units from Texas Cooling Distributors. About $7,500 is still owed on this account (Texas Cooling was able to recover three of the units) (Tr. 140-143).

Petitioner Mary Base[2] was hired as a secretary for F & W and was paid $2.00 an hour (Tr. 26, 333). She worked at F & W for about five weeks, from the time the F & W office was opened until it was closed (Tr. 106, 335). She answered the telephone and typed purchase orders and at least one sales order (Tr. 106-107, 335-337). When she was hired she used the name Mary Doss; while testifying on her own behalf, petitioner Base stated that she had heard that Cash had tried to "bother" another secretary "in and out" of the office, and she felt that Cash could not find out where she lived if she used an alias (Tr. 334).

Leo Reed, an employee of American Canvas Manufacturing Company, testified that petitioner Base purchased, on behalf of F & W, fourteen tarpaulins for campers, which cost about $2,000. American Canvas has not been paid for the tarpaulins (Tr. 202-203).

Business meetings of F & W were held in the presence of petitioners Ward and Base[3] (Tr. 31-33). The record does not reflect precisely what was discussed.

1. At trial, Cash testified that he had not been offered anything in return for his testimony (Tr. 110). He admitted pleading guilty to the same indictment that was returned against petitioners,[4] and he also admitted that

---

[2]In its decision, the court of appeals states that petitioner Base is related to petitioner Hawkins (Pet. App. A-3). Actually, petitioner Hawkins is the brother-in-law of petitioner Base's husband (Tr. 338).

[3]In its decision, the court of appeals states (Pet. App. A-3) that petitioner Base participated in some meetings, but the record discloses only that she was present (Tr. 33).

[4]Cash pleaded guilty on May 24, 1973 and was sentenced on July 31, 1973, to the custody of the Attorney General for five years (the maximum sentence provided by law) pending a study pursuant to 18 U.S.C. 4208(a)(2) to enable the court to fix parole eligibility at the time of sentencing. Cash testified at petitioners' trial on October 31, 1973. On December 4, 1973, pursuant to 18 U.S.C. 4208(b)(2) his sentence was reduced to two years' probation.

there were two other indictments pending against him (Tr. 120-124). Cash testified that he had not been advised that the two pending indictments would be dismissed; he expected to go to trial on them (Tr. 124).

Following the return of the jury's verdict convicting petitioners, a hearing was held on petitioners' motions for a new trial based on newly discovered evidence. Curtis Parks, Cash's counsel, testified that when Cash pleaded guilty to one charge prior to the trial of petitioners, an understanding had been reached with the government concerning the two pending indictments. Parks stated that, in return for Cash's plea of guilty, the two pending indictments were to be dismissed (Tr. 409-411). Parks was asked if there was an understanding that Cash would testify at petitioners' trial. Parks' response was, "Well, that was certainly inferred. I mean it was" (Tr. 413). Parks stated that he informed Cash of the understanding (Tr. 410-411).

After Parks' testimony, the government represented that there was no agreement to dismiss the two pending indictments. The trial court thereupon denied petitioners' motions for a new trial. The court stated that it had heard all of the evidence and was convinced that petitioners had received "a fair trial" (Tr. 416).

Petitioners now contend—as they did in the court of appeals—that the ruling below was erroneous and that Cash had knowingly testified falsely when he said that he had been offered nothing in return for his testimony.

When the court denied the motions for a new trial, the effect of the denial was a ruling that there had been no understanding between the government and Cash's counsel.[5] This finding is not clearly erroneous in view of the government's denial of the existence of any such agreement. But even if there had been an understanding, Cash's testimony only corroborated the testimony of Sumrall[6] as to the formation and operation of F & W Industrial Supply (Tr. 17-42; 85-97). Accordingly, there was no reasonable likelihood that Cash's denial of an understanding with the government could have affected the verdict. Compare *Giglio* v. *United States*, 405 U.S. 150, 154; *Brady* v. *Maryland*, 373 U.S. 83, 87 (Tr. 17-19, 85-90).

2. Petitioners Ward and Base contend that there was insufficient evidence to sustain their convictions. However, petitioner Ward did not raise this claim in the court of appeals and, since there are no exceptional circumstances present, this Court need not consider his claim. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. In any event, the claim is without merit. As the record shows,

---

[5]Petitioners contend that the decision of the court of appeals is in conflict with *Teague* v. *United States*, 499 F.2d 1381, 1385 (C.A. 7). *Teague* required a post-conviction hearing to determine if a key government witness had been promised any leniency. Such a hearing was held in the trial court in this case; there is, thus, no conflict.

[6]Troy Sumrall was granted immunity by the government.

both Ward and Base were present at meetings held at the F & W office. Base placed one and Ward placed two purchase orders on behalf of F & W (Tr. 126-127, 140-143, 202-203). Petitioner Base used an alias when she worked at F & W, and she was employed by the fraudulent company for five weeks of its short life (Tr. 334-335). The evidence was thus sufficient to enable the jury to believe that both Ward and Base were aware of the fraudulent scheme and actively participated in it.[7] See *United States* v. *Glasser*, 315 U.S. 60, 80.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

---

[7]Petitioner Base asserts that the court of appeals held that an unknowing participation in the conspiracy would be sufficient to support her conviction (Pet. 31). The court, however, was merely stating that petitioner Base had testified on her own behalf and the jury had the opportunity to draw the inference of her knowing or unknowing participation from her testimony and from other evidence (Pet. App. A-3).